

REMARKS

Claims 1-6 are pending in the present application. Claims 7-16 have been withdrawn by restriction. Reexamination of the application and reconsideration of the rejections and objections are respectfully requested in view of the following remarks, which follow the order set forth in the Office Action.

Rejections under 35 U.S.C. § 102

First § 102 Rejection

Claims 1-6 were rejected under 35 U.S.C. § 102(e) as being assertedly anticipated by Masterson, U.S. Patent No. 6,370,811 ("Masterson"). Applicants respectfully traverse.

Claim 1 relates to a camouflaged termite monitoring device that comprises a housing configured as a landscape element. The housing is adapted to engage an upper ground surface and to define a cavity and an opening to the cavity through a ground-contacting surface of the housing. A perforated bait cartridge is configured to fit within the cavity, and a bait material, which is adapted to be attractive to termites, is disposed within the bait cartridge. A mesh-like member is operably engaged with the housing about the ground-contacting surface so as to cover the opening and to retain the bait cartridge in the cavity. The mesh-like member is the entry location into the cavity for termites that are attracted by the bait material. An inspection hatch is operably engaged with the housing and configured to allow visual inspection of the bait cartridge within the cavity from outside the housing in order to determine whether termites have infiltrated the housing and consumed the bait material in the bait cartridge without removing the housing from engagement with the upper ground surface.

The claimed termite-monitoring device is intended to be placed above the upper ground surface, at least in part, to allow users easy access to the device. In view of its intended placement, the device is camouflaged and configured as a landscape element to make it more visually attractive and/or better able to blend into the background. See specification in form of publication of priority international application, WO2004/036990 p.4, lines 21-27. The device is preferably unobtrusive or otherwise natural in a residential setting. *Id.* For example, the housing may be a rock, a log, a paving or stepping stone, a brick, or a border element for a flowerbed or the like. *Id.* As such, the

claim limitation that the device is configured as a landscape element is an important feature of the claimed device.

It is also important that the device housing engage the upper ground surface. Such engagement with the upper ground surface enables any termites that are present in the area surrounding the device to enter into the housing. More specifically, the upper ground surface is the pathway through which termites enter the device because the termites enter through the opening in the ground contacting surface of the housing. The opening is covered by the mesh-like member, which enables termites to enter the housing while at the same time retaining the bait cartridge in the housing. Because the opening is directed toward the upper ground surface, it cannot provide a direct visual means of inspection of the bait cartridge without removing the housing from engagement with the upper ground surface. Therefore, an inspection hatch is provided in the housing on the opposite side of the ground-contacting surface, i.e. on the upper surface of the housing, to allow a direct visual inspection of the bait cartridge within the cavity from outside the housing. The inspection hatch provides a user a direct view of the bait cartridge and the bait in order to determine whether termites have infiltrated the housing without removing the housing from engagement with the upper ground surface.

Masterson discloses a device for monitoring the activity of invasive organisms such as termites. Col. 3, lines 29-31. The device comprises a body having a test or bait element. The device further comprises a flag member that is axially movable within the housing. The flag member is coupled to the test element. When a predetermined amount of weakening of the test element occurs, the element fractures causing the flag member to snap into a position viewable from a distance as an indication of termite activity. Col. 3, lines 32-65. Masterson fails to disclose a device configured as a landscape element, a mesh-like member operably engaged with the housing about the ground-contacting surface to retain the bait cartridges in the cavity, or an inspection hatch allowing visual inspection of the bait cartridge within the cavity from outside the housing.

With regard to the lack of disclosure of a landscape element, in contrast to the claimed device, the Masterson device is designed to be embedded in the ground. See, col. 4, lines 19-20 and col. 4, lines 66-67. As such, the appearance of the device is not a design concern for the inventors thereof. The device includes a portion that is disposed above ground when it is installed. This portion includes a circular skirt member that

facilitates imbedding the housing of the device in the ground. The skirt member rests on the ground when the device is installed. Col. 5, lines 15-16. In addition, a main cap is centrally disposed on the skirt member and is upwardly convex so as to smoothly deflect passing objects such as lawn mowers and the like that may be used in the vicinity of the device. Col. 5, lines 23-26. As the Masterson device is constructed to be embedded in the ground, it would not be camouflaged or recognizable as a landscape element. Furthermore, as the flag member must be visible in order to provide functionality for the device, the portion of the device described as being disposed above ground level, e.g., the skirt member and the main cap, should thus not be camouflaged but must be clearly visible. Thus, the Masterson device is neither camouflaged nor configured as a landscape element, as required by claim 1.

With regard to the lack of disclosure of a mesh-like member operably engaged with the housing about the ground-contacting surface to retain the bait cartridges in the cavity, the Office Action interprets the barrier member 42 and the perforations 43 of the Masterson device as corresponding to the mesh-like member of the present invention. However, these elements do not contact the upper ground surface. As recited in claim 1 and the specification, the term "ground" means the upper ground surface upon which the housing is disposed such that the housing has a ground-contacting surface engaging the upper ground surface. The barrier member and perforations are embedded in the ground, thus they cannot be in contact with an upper ground surface. Further, the barrier member and the perforations do not retain the bait cartridge in the cavity of the housing, as required by claim 1. Rather, the bait element is disclosed as being typically in the form of a cardboard strip or rod, wooden rod or dowel that is anchored to the device via a stop device attached at a bottom extremity of the bait element. Col. 3, lines 37-43. Thus, the Masterson device fails to disclose a mesh-like member as recited in claim 1.

With regard to the lack of disclosure of an inspection hatch allowing visual inspection of the bait cartridge within the cavity from outside the housing, Masterson discloses a means for detection of termite infiltration that does not involve direct visual inspection of the bait cartridge in the cavity of the device. More specifically, Masterson discloses a flag member that snaps into a viewable position when a predetermined amount of weakening of the test element occurs. The Office Action proposes that the main cap 54 and bail member 56 may be removed to allow visual inspection of the bait

cartridge in the cavity. Initially, Applicants note that a user would not forsake the intended means of termite detection, i.e., the raised flag, in favor of the approach proposed by the Office Action. Further, Applicants note that even if a user chose the alternative method of detection proposed by the Office Action, the user would not even be able to see the bait member because a view thereof would be occluded by additional components of the device including the stop ring and the compression spring that enable the flag detection feature. If a user chooses to view the bait element of the Masterson device, he must remove the core portion from the housing, as disclosed at col. 5, lines 47-49. Removing the core portion from the device does not meet the limitation of viewing the bait cartridge within the housing from outside the housing, as required by claim 1.

Based on the foregoing, Applicants assert that the invention of claim 1 is not anticipated by Masterson. Accordingly, Applicants respectfully request reconsideration and withdrawal of the instant rejection.

Second § 102 Rejection

Claims 1-6 were rejected under 35 U.S.C. § 102(e) as being assertedly anticipated by Nimocks, U.S. Patent No. 5,950,356 ("Nimocks"). Applicants respectfully traverse.

Nimocks discloses a device for termite detection and eradication comprising a housing 11 including termite access openings 7 formed in a surface of the housing, a baiting and access opening 6, and interceptor sheets 1 disposed parallel to the surface of the housing for attracting termites to the housing. The interceptor is fixedly attached to the housing to insure that it will not be moved or removed from the housing. Col 10, lines 6-8. The interceptor comprises a cellulose containing material that is palatable to termites to attract the termites and enable the termites to eat therethrough in moving toward the bait. In addition, the interceptor has no termite entry holes. Col. 11, lines 8 et seq. Nimocks fails to disclose a device configured as a landscape element, an opening to the cavity through a ground-contacting surface, or a mesh-like member operably engaged with the housing about the ground-contacting surface to retain the bait cartridges in the cavity.

With regard to the failure to disclose a device configured as a landscape element, Nimocks discloses burying the device to eradicate subterranean termites. Col. 13, lines 10-11. For a device that is to be buried, there is no concern over the appearance thereof.

Although it is mentioned that the device may be attached to cellulose containing members of structures being attacked above ground, there is no disclosure of a particular shape and/or appearance for the devices being used above ground. The embodiments shown in the Nimocks figures are rectangular in shape and do not appear to be configured as a landscape element of any sort.

Nimocks fails to disclose an opening to the cavity through a ground-contacting surface. As indicated above, as recited in claim 1 and the specification, the term "ground" means the upper ground surface upon which the housing is disposed such that the housing has a ground-contacting surface engaging the upper ground surface. The termite access openings 7 of Nimocks are not made through a ground-contacting surface, as required by claim 1, but rather through side surfaces of the housing. The bottom of the housing is solid (see col. 8, line 67- col. 9, line 1), thus even if the housing of Nimocks happened to be placed on an upper ground surface, an opening thereof would not be through a ground-contacting surface because the bottom is solid. Further, any argument that the housing could be orientated for placement differently than shown in the figures and suggested by the specification of Nimocks is without merit because any other orientation would likely result in the bait material falling out of the housing thus detrimentally affecting the functionality of the device.

Nimocks also fails to disclose a mesh-like member operably engaged with the housing about the ground-contacting surface so as to cover the opening and retain the bait cartridges in the cavity. The Office Action asserts that the interceptor 1 with openings 2 may serve as a mesh-like member. Applicants note that claim 1 requires that the mesh-like member cover the opening. The openings 2 of Nimocks fail to cover what the Office Action identified as the opening 7 thereof. Rather, the openings 2 are merely holes drilled through the tops of the interceptors to enable the interceptors to be fixedly attached to the housing. Col. 9, lines 19-24. Further, the interceptor is not a mesh-like material. Rather, it is a solid material used to intentionally exclude nontarget organisms from entering the housing. The only way an organism, i.e., termite, may enter the housing is to eat its way through. Col. 11, lines 40-42. The termite must make an opening through the interceptor to obtain entry into the housing. As such, the interceptor may not be interpreted to be a mesh-like material.

Based on the foregoing, Applicants assert that the invention of claim 1 is not anticipated by Nimocks. Accordingly, Applicants respectfully request reconsideration and withdrawal of the instant rejection.

For the foregoing reasons, claim 1 and claims 2-6, depending therefrom, are considered allowable. A Notice to this effect is respectfully requested. If any questions remain, the Examiner is invited to contact the undersigned at the number given below.

Respectfully submitted,

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